SUBCHAPTER C : HEARING PROCEDURES
§§80.101, 80.103, 80.105, 80.107, 80.109, 80.111, 80.113, 80.115, 80.117, 80.119, 80.125, 80.127, 80.129, 80.131, 80.133, 80.135, and 80.137
Effective May 15, 1997

§80.101. Remand to Executive Director.

At the request of the applicant, a judge shall remand an application to the executive director if all timely hearing requests have been withdrawn or denied or, if parties have been named, all parties to a contested case reach a settlement so that no facts or issues remain controverted. After remand, the application shall be uncontested and the applicant is deemed to have agreed to the action of the executive director. The executive director may act on the application or set it for a commission meeting.

Adopted April 16, 1997 Effective May 15, 1997
Derived from §§263.5, 263.11, and 265.41

§80.103. Procedure Before Preliminary Hearing.

(a) Conference before preliminary hearing.

(1) At the judge's discretion, a conference before hearing may be held at a time and place stated in the notice. If notice of the conference is not given in the notice of public hearing, notice of the conference shall be mailed at least ten days prior to the conference or the conference may be held at the public hearing date, time, and place stated in the notice of public hearing. If notice of public hearing is required to be published, notice of a conference to be held prior to the initial public hearing date shall be published at least ten days prior to the conference.

(2) Any issue appropriately considered at a preliminary hearing may be considered at a conference.

(b) Record of conference action. As determined by the judge, action taken at the conference shall be reduced to writing and made a part of the record or a statement thereof shall be made on the record at the close of the conference or at the hearing. After a prehearing conference, the judge may make appropriate rulings concerning matters discussed at the conference.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.43

§80.105. Preliminary Hearings.

(a) After the required notice has been issued, the judge shall convene a preliminary hearing to consider the jurisdiction of the commission over the proceeding. A preliminary hearing is not required in an enforcement matter.

(b) If jurisdiction is established, the judge shall:

(1) accept public commentary and name the parties;

(2) set a discovery and procedural schedule including a mechanism for the timely and expeditious resolution of discovery disputes; and

(3) allow the parties an opportunity for settlement negotiations.

(c) When agreed to by all parties in attendance at the preliminary hearing, the judge may proceed with the evidentiary hearing on the same date of the first preliminary hearing.

(d) One or more preliminary hearings may be held to discuss:

(1) formulating and simplifying issues;

(2) evaluating the necessity or desirability of amending pleadings;

(3) all pending motions;

(4) stipulations;

(5) the procedure at the hearing;

(6) specifying the number and identity of witnesses;

(7) filing and exchanging prepared testimony and exhibits;

(8) scheduling discovery;

(9) setting a schedule for filing, responding to, and hearing of dispositive motions; and

(10) other matters that may expedite or facilitate the hearing process.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §§265.60, 265.103, 337.34, and 337.41

§80.107. Sanctions.

(a) On the judge's own motion or on motion of a party and after notice and an opportunity for a hearing, a judge may impose sanctions against a party or its representative for:

(1) filing a motion or pleading that is groundless and brought:

(A) in bad faith;

(B) for the purpose of harassment; or

(C) for any other improper purpose, such as to cause unnecessary delay or needless increase in the cost of the proceeding;

(2) abuse of the discovery process in seeking, making, or resisting discovery; or

(3) failure to obey an order of the judge or the commission.

(b) A sanction imposed under this section may include, as appropriate and justified, issuance of an order:

(1) disallowing further discovery of any kind or of a particular kind by the offending party;

(2) charging all or any part of the expenses of discovery against the offending party or its representatives;

(3) holding that designated facts be considered admitted for purposes of the proceeding;

(4) refusing to allow the offending party to support or oppose a designated claim or defense or prohibiting the party from introducing designated matters in evidence;

(5) disallowing in whole or in part requests for relief by the offending party and excluding evidence in support of those requests; and

(6) striking pleadings or testimony, or both, in whole or part.

Adopted May 8, 1996 Effective June 6, 1996
Derived from New

§80.109. Designation of Parties.

(a) Determination by judge. All parties to a proceeding shall be determined at the preliminary hearing or when the judge otherwise designates. To be admitted as a party, a person must have a justiciable interest in the matter being considered and must, unless the person is specifically named in the matter being considered, appear at the preliminary hearing in person or by representative and seek to be admitted as a party. After parties are designated, no other person will be admitted as a party except upon a finding that good cause and extenuating circumstances exist and that the hearing in progress will not be unreasonably delayed. At the discretion of the judge, persons who are not parties may be permitted to make or file statements.

(b) Parties.

(1) The executive director and public interest counsel of the commission are parties to all commission proceedings.

(2) The applicant is a party in a hearing on its application.

(3) Affected persons shall be parties to hearings on permit applications, based upon the standards set forth in §55.29 of this title (relating to Determination of Affected Person).

(4) The Texas Water Development Board shall be a party to any commission proceeding in which the board requests party status.

(5) The Texas Parks and Wildlife Department shall be a party in commission proceedings on applications for permits to store, take, or divert water if the department requests party status.

(6) The parties to a contested enforcement case include the respondent(s), and any other parties authorized by statute.

(7) The parties to a hearing upon a challenge to commission rules include the person(s) challenging the rule and any other parties authorized by statute.

(8) The parties to a permit revocation action initiated by a person other than the executive director shall include the respondent and the petitioner.

(c) Alignment of participants. Participants (both party and non-party) may be aligned according to the nature of the proceeding and their relationship to it. The judge may require participants of an aligned class to select one or more persons to represent them in the proceeding. Unless otherwise ordered by the judge, each group of aligned participants shall be considered to be one party for the purposes of §80.115 of this title (relating to Rights of Parties) for all purposes except settlement.

(d) Effect of postponement. If a hearing is postponed for any reason, any person already designated as a party retains party status.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.61

§80.111. Persons Not Parties.

Persons not designated as parties may register protests or make comments orally or in writing. These protests or comments shall be included in the files of the proceeding, but shall not be considered by the judge as evidence in the record. In proceedings other than enforcement proceedings, these persons may, at the judge's request, submit questions to the judge. The judge may address any such questions to witnesses where it appears that this questioning may lead to a full disclosure of the facts without unduly delaying the hearing or burdening the record.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.62

§80.113. Appearance.

(a) Any person may appear at a hearing in person or by authorized representative. A person appearing in a representative capacity may be required to prove his authority.

(b) Except for good cause, the applicant or petitioner shall appear at the public hearing. Failure to so appear may be grounds for withholding consideration of a matter or for dismissal without prejudice.

(c) An affidavit may be made by either the party or a representative, unless otherwise provided by statute.

(d) Failure to appear at an enforcement hearing may result in a default order under §70.106 of this title (relating to Default Orders).

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.63

§80.115. Rights of Parties.

(a) A party has the right to conduct discovery, present a direct case, cross-examine witnesses, make oral and written arguments, obtain copies of all pleadings, motions, replies, and other filed documents, receive copies of all notices issued by the commission concerning the proceeding to which the person is a party, and, as directed by the judge, otherwise fully participate as a party in the proceeding.

(b) Except in enforcement matters, a person may seek leave to withdraw his or her party status at any time upon written request to the judge or by request stated on the record during a hearing. Party status is not withdrawn unless and until the judge grants the request for leave to withdraw.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §§265.64, 337.36, and 337.45

§80.117. Order of Presentation.

(a) In all proceedings, the moving party has the right to open and close. Where several matters have been consolidated, the judge will designate who will open and close. The judge will determine at what stage other parties will be permitted to offer evidence and argument. After all parties have completed the presentation of their evidence, the judge may call upon any party for further material or relevant evidence upon any issue.

(b) In a permit hearing, the executive director shall open with a simple statement of his preliminary position on the application and, in a permit hearing, will present the draft permit including special provisions,

if any. The applicant shall then present evidence to meet its burden of proof on the application, followed by other parties, the public interest counsel, and the executive director. In all cases, the applicant shall be allowed a rebuttal. Any party may present a rebuttal case when another party presents evidence that could not have been reasonably anticipated.

(c) In all contested enforcement case hearings, the executive director has the right to open and close. In all such cases, the executive director shall be allowed to close with his rebuttal.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.64 and §337.47

§80.119. Continuance.

(a) The judge may continue a hearing from time to time and from place to place. If the time and place for the hearing to reconvene are not announced at the hearing, a notice shall be mailed at a reasonable time to all parties and other persons who, in the opinion of the judge, may be affected by action taken as a result of the hearing.

(b) Motions for continuance shall be in writing or stated on the record, and shall be sworn unless the facts alleged therein to show good cause are part of the record of the proceeding.

(c) Upon joint motion of all parties, the judge may continue the hearing to allow the parties to use alternative dispute resolution procedures or to engage in and complete settlement negotiations.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §§265.65, 337.33, and 337.43

§80.125. Agreements.

Agreements between parties affecting any pending matter must be in writing, signed and filed as a part of the record, or announced at the hearing and entered in the record.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.68 and §337.44

§80.127. Evidence.

(a) General admissibility of evidence.

(1) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. The Texas Rules of Civil Evidence, as applied in nonjury civil cases in the district courts of this state, shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be admitted, except where precluded by statute, if it is of a type commonly

relied upon by reasonably prudent people in the conduct of their affairs. The judge shall give effect to the rules of privilege recognized by law.

(2) Testimony will be received only from witnesses called by a party or the judge. The judge may allow or request testimony from any person whose position is not adequately represented by any party, subject to cross-examination by all parties. Such testimony shall only be allowed at the judge's discretion. All parties shall have an opportunity to conduct discovery of such person.

(3) Testimony offered by any witness shall be under oath.

(b) Stipulation. Evidence may be stipulated by agreement of all parties. The judge and commission will determine the weight, if any, to be accorded stipulated evidence.

(c) Prefiled testimony and exhibits. The judge may require or allow parties to prepare their direct testimony in written form if the judge determines that a proceeding will be expedited and that the interests of the parties will not be prejudiced substantially. The judge may require the parties to file and serve their direct testimony and exhibits before the beginning of the hearing. The prepared testimony of a witness upon direct examination, either in narrative or question and answer form, may be admitted into evidence as if read or presented orally, upon the witness' being sworn and identifying the same as a true and accurate record of what the testimony would be if given orally. The witness shall be subject to cross-examination, and the prepared testimony shall be subject to objection.

(d) Exhibits.

(1) Exhibits of a documentary character shall not exceed 8 ½ by 11 inches unless they are folded to the required size. Maps and drawings which are offered as exhibits shall be rolled or folded so as not to unduly encumber the record. Exhibits not conforming to this rule may be excluded.

(2) Each exhibit offered shall be tendered for identification and placed in the record. Copies shall be furnished to the judge, each of the parties, and the hearings reporter, unless the judge rules otherwise.

(3) If an exhibit has been identified, objected to, and excluded, it may be withdrawn by the offering party. If withdrawn, the exhibit will be returned and the offering party waives all objections to the exclusion of the exhibit. If not withdrawn, the exhibit shall be included in the record for the purpose of preserving the objection to the exclusion of the exhibit.

(e) Official notice.

(1) The judge may take official notice of all facts judicially cognizable. In addition, the judge may take official notice of any generally recognized facts within the specialized knowledge of the commission.

(2) The judge shall notify all parties of any material officially noticed, including any memoranda or data prepared by the executive director and relied upon by the commission in prior proceedings. All parties shall be afforded an opportunity to contest any material so noticed.

(f) Invoking the "rule." At the request of any party, and subject to the discretion of the judge, witnesses may be placed under "the rule" as provided by, and subject to the conditions of, Texas Rule of Civil Procedure 267 and Texas Rule of Evidence 613.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §§265.69, 337.42, and 337.45

§80.129. Objections.

Objections shall be timely noted in the record. Formal exception to the ruling of the judge is not necessary to preserve the objecting party's right on appeal.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.70

§80.131. Interlocutory Appeals and Certified Questions.

(a) No interlocutory appeals may be made to the commission by a party to a proceeding before a judge except that in an enforcement action a party may seek an interlocutory appeal to the commission on jurisdictional issues only.

(b) On a motion by a party or on the judge's own motion, the judge may certify a question to the commission. Certified questions may be made at any time during a proceeding, regarding commission policy, jurisdiction, or the imposition of any sanction by the judge which would substantially impair a party's ability to present its case. Policy questions for certification purposes include, but are not limited to:

(1) the commission's interpretation of its rules and applicable statutes;

(2) which rules or statutes are applicable to the proceeding; or

(3) whether commission policy should be established or clarified as to a substantive or procedural issue of significance to the proceeding.

(c) If a question is certified the judge shall file a request to answer the certified question with the chief clerk and serve copies on the parties. Within five days after the request is filed, parties to the proceeding may file briefs or replies. The chief clerk shall provide copies of the request and any briefs or replies to the general counsel and commission. Upon the request of the general counsel or a commissioner to the general counsel, the request will be scheduled for consideration during a commission meeting. The chief clerk shall give the judge and parties notice of the meeting. The judge may abate the hearing until the commission answers the certified question, or continue with the hearing if the judge determines that no party

will be substantially harmed. If the chief clerk does not receive a request from the general counsel to set the question for consideration within 15 days after filing, the request is denied by operation of law.

Adopted April 16, 1997 Effective May 15, 1997
Derived from §265.71 and §337.40

§80.133. Oral Argument.

At the conclusion of the hearing, oral argument may be heard upon request of the parties or at the judge's direction. The judge may prescribe reasonable time limits, and may require or accept written briefs in lieu of oral arguments, and may set a schedule for the submission of written briefs.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.72 and 337.48

§80.135. Submittal of Findings of Fact and Conclusions of Law.

The judge may request that the parties submit proposed findings of fact and conclusions of law separately stated.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §265.73

§80.137. Summary Disposition.

(a) Motion. After the preliminary hearing and up to 21 days before the evidentiary hearing, a party may file a motion for a summary disposition of all or any part of an action. The motion shall state the specific issues upon which the summary disposition is sought, and the specific grounds justifying the summary disposition. Except upon leave of the judge, with notice to opposing parties, the motion, any supporting affidavits, and any other relevant documentary evidence shall be filed and served at least 21 days before the date set for ruling on the motion.

(b) Written response. Except upon leave of the judge, a party may file and serve a written response, any supporting affidavits, and any other relevant documentary evidence at least seven days before the date set for ruling on the motion.

(c) Summary disposition. Summary disposition shall be rendered if the pleadings, admissions, affidavits, stipulations, deposition transcripts, interrogatory answers, other discovery responses, exhibits and authenticated or certified public records, if any, on file in the case at the time of the hearing, or filed thereafter and before judgment with the permission of the judge, show that there is no genuine issue as to any material fact and the moving party is entitled to summary disposition as a matter of law on all or some of the issues expressly set out in the motion or in an answer or any other response.

(d) Testimony. A summary disposition may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the judge must be guided solely by the opinion testimony of experts. The evidence must be clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. No oral testimony shall be received at a hearing on a motion for summary disposition.

(e) Appendices, references and other use of discovery not otherwise on file. Discovery products not on file with the chief clerk may be used as summary disposition evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary disposition proofs:

(1) at least 21 days before the date set for ruling on the motion if such proofs are to be used to support the summary disposition; or

(2) at least seven days before the date set for ruling on the motion if such proofs are to be used to oppose the summary disposition.

(f) Form of affidavits; further testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The judge may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

(g) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the judge may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(h) Argument and ruling on motion. At the discretion of the judge, a hearing may be held and oral argument may be presented on the motion. The judge may rule on the motion with or without a hearing.

(i) Disposition of motion. If the judge grants a motion for summary disposition on all parts of an action, the judge shall close the hearing and prepare a proposal for decision. If the judge grants a motion for summary disposition on any part of an action, the judge shall not take evidence or hear further argument upon that part of the action, and shall enter an order specifying the facts that appear without substantial controversy, and directing such further proceedings as are just. Upon the hearing of the application the facts so specified shall be deemed established, and the hearing shall be conducted accordingly.

(j) Proposal for decision. At the close of the hearing, the judge shall include in the proposal for decision a statement of reasons, findings of fact and conclusions of law in support of any summary disposition rendered.

Adopted May 8, 1996 Effective June 6, 1996
Derived from §337.39 and New

Derivation Table
Chapter 80 - Contested Case Hearing
Subchapter C : Hearing Procedures

This table is to be used to track sections after rule revisions. The column on the left should list the sections after the revision. The column on the right should list where the section was prior to the revision.

New Section	Old Section
80.101	263.5, 263.11, 265.41
80.103	265.43
80.105	265.60, 265.103, 337.34, 337.41
80.107	New
80.109	265.61
80.111	265.62
80.113	265.63
80.115	265.64, 337.36, 337.45
80.117	265.64, 337.47
80.119	265.65, 337.33, 337.43
80.125	265.68, 337.44
80.127	265.69, 337.42, 337.45
80.129	265.70
80.131	265.71, 337.40
80.133	265.72, 337.48
80.135	265.73
80.137	337.39, New